No. 12,537

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

NIELS K. WIBYE,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

HAROLD WIBYE,
Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Regulations

Statutes

Texts

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STATEMENT OF THE CASE.

This is a suit under the "Federal Tort Claims Act." Taking the Appellee Harold Wibye's testimony as true, it appears that the facts of this case are as follows (Number in parenthesis refers to Transcript of Record):

The accident happened on State Route 513. This highway runs between the Town of Castro Valley and the Town of Dublin. It is a three-lane highway with

each lane sharply and clearly defined by white lines. Each lane is 11 feet wide (128). At the place of the accident and for approximately 110 yards, the highway is straight. There was no traffic at the time, other than the two vehicles involved in the accident (53).

The accident happened on a clear, dry, bright day, Friday, November 8, 1946, at about 4:45 P. M. For a quarter of a mile prior to the accident appellees had been traveling easterly on the extreme right-hand lane within 6 inches of the right-hand edge of the highway at a speed of approximately 50 miles per hour. Harold Wibye, the driver, first noticed the Government vehicle when it was approximately 120 to 150 feet from him.

The Government car was traveling westerly in its right lane. From the time he first noticed it, it traveled about 35 feet steering slightly to the left until it was about 2 feet in the center lane, then suddenly made (to quote Harold Wibye) "a sharp left-hand turn cutting clear across the center lane and striking the inside of the right front wheel of our automobile * * * he practically cut clear in front of me and hit the right-hand front wheel." (54) * * * (He) "did not apply the brakes very heavily" and there was no swerve to his car (55). Apparently there was no skidding (132).

Officer Schoening of the California Highway Patrol testified Harold Wibye stated to him, "I passed a car somewhere before I started to turn and that's the last

I remember" (133). Although this is a definite contradiction to Harold Wibye's testimony, yet it appears to be a question of fact for the trial Court to decide and it took the testimony of Harold Wibye as true.

Niels Wibye did not notice the Government vehicle at all. He did not know anything about the actual accident (86-87).

Directing the testimony to the point as to whether or not John Hadley was in the course and scope of his employment, we find——

The Government stipulated that Hadley, the driver of the Government car and who was killed in the accident, was an employee of the United States and that it was a United States vehicle (138-139) but denied he was in the course and scope of his employment.

Plaintiff offered Exhibit No. 22 (202) which purported to be an itinerary of a Laison Team and particularly of John Hadley.

These were all the facts as to this point on the part of appellees.

The United States called Edna Fipps, who has resided in San Francisco for approximately the past thirty years, and who is the mother of John Hadley (150). She testified that on Thursday, November 7, 1946, her son, John Hadley, telephoned her from Stockton between 3:00 and 4:00 P. M. (150-152) in regard to his having dinner with her about 6:00 P.

M. at her home located at 618 - 17th Avenue, San Francisco, the next day, Friday (154); that Hadley was supposed to have completed his work in time to come to her home in San Francisco for dinner on that Friday (156). He also told her "he was going to cash a check at the Finance Company". (161).

QUESTIONS OF LAW.

The facts present the following questions of law:

(1) Does the testimony of appellees establish a case of negligence on the part of Hadley?

(2) The more important question perhaps is, Was Hadley, *at the time of the accident,* acting within the *course* and *scope* of *his* employment?

DOES THE TESTIMONY ESTABLISH NEGLIGENCE ON THE PART OF HADLEY?

Negligence is not presumed. The doctrine of *res ipsa loquitur* does not apply when the accident may have arisen from more than one cause. The character of the accident rather than the facts determine the doctrine of *res ipsa loquitur.*

Edwards v. Gullock, 295 Pac. 372.

Appellees, in addition to proving appellant did some act without which the collision would not have occurred, "must demonstrate that defendant was en-

abled to forsee or know of the danger of his conduct * * *"

2 Cal. Jur. Supp. 161-461.

The burden of proof is on the appellees and if two justifiable inferences may be drawn from the facts proved, one for and the other against the appellees, neither is proven and as a matter of law it must be against the party who has the burden of proof—in this case, the appellees.

Texas Co. v. Hood, 161 Fed. (2d) 618.

Presumptions do not arise under the doctrine of *res ipsa loquitur.*

Gritsch v. Pickwick, 131 C.A. 774, 22 Pac. (2d) 554.

"One suddenly stricken by illness which he has no reason to anticipate while driving automobile, which rendered it impossible for him to control the car, was not chargeable with negligence". (Syllabus).

Cohen v. Patty, 65 F. (2d) 820;

Ford v. Carew & English, 89 C.A. (2d) 199.

"It is presumed that one exercises ordinary care for his own safety. Self preservation is the first law of life".

Davis v. Tanner, 88 C.A. 67, 262 Pac. 1106.

The evidence shows that on a clear, dry day on a straight, broad highway, Hadley suddenly and sharply swerved clear over into the car of appellees. There could be no testimony as to why he did so as Hadley is dead. No one would deliberately do this. Would

the conclusion be, as a matter of law, that he unavoidably lost control and the accident was unavoidable on his part?

This Court stated in

Diamond Fotopulos, et ux. v. U. S., ... Fed. (2d) ..... (decided Mar. 7, 1950)

"The presumption that a person looks out for his own safety, comes to the aid of the plaintiff * * *. This presumption rises to the dignity of evidence when * * * because of death, the plaintiff cannot testify * * *. And it is sufficient to support the * * * findings of a Court *unless overcome by irrefutable evidence.*"

WAS HADLEY, AT THE TIME OF THE ACCIDENT, ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT?

We do not believe the facts justify the finding that he was. The mere fact that he was a Government employee and in a Government car, is not sufficient. Obviously Hadley could have been doing a number of things that would constitute being on his own affairs at the time, even if driving a Government car and an employee of the Government. The appellees rely on a presumption that these facts, unless rebutted by appellant, are sufficient; that the law of California applies and the law directs this presumption shall apply.

The Tort Claims Act states, under the heading *"Jurisdiction",*

> "Subject to the provisions of this title * * * the United States District Court * * * shall have exclusive jurisdiction * * * render judgment * * * on account of personal injury * * * caused by the neglect or wrongful act * * * of any employee of the Government *while acting in the scope of his office or employment* (italics ours) under circumstances where the United States, if a private person, would be liable to the claimant * * * in accordance with the law of the place where the act or omission occurred".

It will be noted that the law specifically makes the United States liable and gives the Court *jurisdiction* only while "acting in the scope of his employment". Therein it differs with the California law. In this case there is no common law involved. It is purely statutory. The plaintiff can sue only through the permission of the sovereign and only upon the exact terms it permits. The Act makes it mandatory on the appellees to *prove* Hadley was at the time of the impact acting within the scope of his employment. If appellees do not do so, the District Court has *no jurisdiction* to try the case. It is a jurisdiction requisite, a condition *sine qua non*. No presumption can be indulged in because (a) the sovereign requires proof, (b) "a presumption is a deduction which the law *expressly* directs to be made * * *". (See 1959 C.C.P. of Calif.). Presumptions are wholly creatures of law.

Davis v. Hearst, 160 C. 143, 116 P. 530.

Here the law expressly states and directs that the Court only has jurisdiction if the employee was in

the scope of his employment and then applies the law of the place of the accident. Congress could have simply left out the scope of employment in the Act, if that was its intention.

The Legislature may provide certain things shall be presumptive or *prima facie* evidence.

People v. Fitzgerald, 14 C.A. (2d) 180, 58 P. (2d) 718.

But Congress did not so provide. On the contrary it made it mandatory that it be proven before the Court has jurisdiction. There are no presumptions even in the State of California, except those enumerated in the Code of Civil Procedure of California.

Setrakian v. I.A.C., 61 C.A. 582, 215 Pac. 504.

Nor can a presumption be based upon a presumption. A similar case of this on the facts and law is the case of

Victor Hubsch v. U. S., 174 F. (2d) 7.

We cannot distinguish that case from the present on the law involved. This case is so important that we do not desire to quote part thereof.

Another case is

U. S. v. Evelyn Campbell, 172 F. (2d) 500.

The facts in this case are not as clearly in point as in the *Hubsch* case but the basis for the decision is the same. In this case a United States sailor, while running for a troop train, struck and injured a lady. The plaintiff contended the sailor was acting "in line

of duty", which in the Tort Claims Act is the same as course and scope of employment. The Circuit Court in holding this was not so stated,

> "The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of respondeat superior, in the same manner and to the same extent as the liability of private persons under that doctrine were measured and limited in the various states. The very heart and substance of the act is to be found in the words, "scope of his office or employment", not as appellee would read them when wrenched out of their context, but as they are precisely limited in it."

A. R. 850-15, Par. 28, provides the regulations for the use of army vehicles. These have the force of law. Subsection *d* provides,

> "Motor vehicles will not be assigned to individuals except to Secretary of War and medical officers on out-patient service. * * *"

Subsection *e* provides:

> "Government vehicles will not be used to transport civilian or military personnel between their places of residence and business * * *"

The trial Court, we believe, would have concluded that there was *insufficient* proof that Hadley was acting within the scope and course of his employment, *without* the evidence of the mother; that in the trial

Court's opinion, the evidence of the mother was sufficient to show Hadley was in the course and scope of his employment, although he was making "a slight deviation". The trial Court was inclined to view the mother's testimony as hearsay, but because neither side objected, it assumed it was admissible. Hence it would appear that, as to this, the first question is, Is the testimony of the mother admissible? At the time we offered it, we believed it was admissible, and still do, on the grounds it is part of the *res gestae* (See 1850 Code of Civil Procedure of California). 113 A.L.R. 268 holds the statement by the deceased with reference to the purpose of destination of the journey he was about to make, was admissible. The appellees at the trial also believe it admissible. If not admissible, certainly there is no proof that Hadley was in the course of his employment. Assuming it is admissible, the next question is, Does it suffice to show Hadley was acting in the course and scope of his employment? We say "No", that on the contrary it proves he was not.

It has been uniformly held that the use of an employer's car for the purpose of going to meals, is not within the course and scope of the employee's business, or a "slight deviation".

Carnes v. Pacific Gas & Electric Co., 21 Cal. App. (2d) 568, 69 Pac. (2d) 998;

Peccale v. City of Los Angeles, 66 Pac. (2d) 651 (Cal.);

Helm v. Bagley, 113 Cal. App. 602, 298 Pac. 826;

Adams v. Tuxedo Land Co., 92 C.A. 266, 267 Pac. 926;

Curie v. Nelson Display Co., 19 C.A. (2d) 46, 64 Pac. (2d) 1158;

Hartlin v. U. S., ... Fed. Supp. .....;

Kish v. California State Automobile Association, 190 Cal. 246, 212 Pac. 27 (the leading case),

and numerous other cases, some of which are cited hereinafter because of special points.

We believe that the deviation made by the driver of the Army vehicle in returning to Ft. Lewis, Washington, from Lathrop, California, by way of San Francisco, is more than a slight deviation as a matter of law. It will be noted, among other matters herein set forth, that such a deviation would make a trip approximately sixty miles longer than would be traveled if a more direct route were taken.

We appreciate that the law in California indicates that a slight deviation from the strict course of duty does not necessarily take the employee out of the scope of employment if meanwhile his main purpose is still to carry on the business of his master.

Westberg v. Willde, 14 Cal. (2d) 360, and cases cited therein;

Cain v. Marquez, 31 Cal. (2d) 430.

The last cited case decided that in California an employee on his way to lunch, even though driving an

automobile which is the property of his master, is not engaged in furthering any end of the employer and under such circumstances the servant is not acting within the scope of his employment. Furthermore, the case holds that where a servant was proceeding in a direction and on a trip diagonally opposite to that dictated by his master's business, such employee was not within the scope of his employment, even though the trip started and would have terminated in a delivery of the master's property to the master's office.

Furthermore, it is noted that in the cases cited by the Court in his discussion, and included within his opinion, all stand for the proposition that a *slight* deviation by an employee does not exonerate his employer from responsibility to a third party injured by the negligence of the employee. With this proposition and statement we find no fault. However, in almost every one of the cases cited, there is language which indicates that if there was a substantial departure from the normal and direct route by an employee from the shortest return route, or if there is presented by the evidence any element of a junketing or a pleasure trip, a different result would in all probability be reached.

Ryan v. Farrell, 208 Cal. 200 (1929);

Dennis v. Miller Automobile Company, 73 Cal. App. 293,

and cases cited therein. See particularly

Cordoy v. Flaherty, 9 Cal. (2d) 716.

The Court did not refer to the case of

Kish v. California State Automobile Association, supra,

which is the leading case, on the subject under consideration, in California. This case is authority for the statement that an employer is not responsible for the acts of his servant while the latter is pursuing his own ends, even though the act could not have been committed without the facilities afforded to the servant by his relation to the master.

It is believed that the instant case falls within the rule expounded in that case. See

Loper v. Morrison, 23 Cal. (2d) 600 (1944).

In this case at page 605 the Court said

> "* * * in deciding the case before us, the results reached in other decisions are helpful but not necessarily controlling * * *. In each case involving scope of employment all of the relevant circumstances must be considered and weighed in relation to one another,"

and further states at page 606

> "* * * the factors to be considered * * * are the intent of the employee, the nature, time and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties."

The Court's attention is invited to

5 *U.S.C.* Section 78(c)(2),

which reads in part:

> "* * * any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle or aircraft or of any passenger motor vehicle or aircraft leased by the Government, for other than official purposes or otherwise violates the provisions of this paragraph shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant."

Our argument, therefore, is that when the intent of employee in these cases is considered, the nature, time and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties, particularly when the statute referred to above is considered. The Court of Appeals should decide as a matter of law, that there was such a deviation by the employee in the instant case as to nullify the effects of the California "Permissive use" statute and should rule that the employee at the time of the happening of the accident was not acting within the scope of his employment.

In

Humphries v. Safeway, 41 P. (2d) 208-210,

which likewise held that going to a meal was not in the scope of employment, held further, that if there is insufficient evidence that the employee was on his employer's business at the time of the accident, the question becomes one of law for the Court to decide.

In the *Humphries* case the agent was employed in one city to go to various stores of the employer in that and adjacent cities. During the course of one of his trips from the city where he was employed, Riverside, to the adjacent town in which he was performing his duties, he had an accident and it was claimed that he was acting at the time within the scope of his employment. The Court, in overruling this claim, stated:

> "Appellant did not require that he live in Riverside, nor that he travel back and forth *between his home and the place of his work. His place of abode was a matter of his own choosing as was the means of transportation used in going to and from his work.* He could have lived in Fontana or any other place and have taken any available means of transportation he desired to get to and return from his place of employment. *After Bachman's work was done, his employer had no control over him until his duties commenced on the following day.*" (Italics ours.)

In

Gousee v. Lowe, 41 C.A. 715, 183 Pac. 295,

the Court, in denying employee was on his employer's business said:

> "Upon an errand of his own the man left the garage and had not returned to within a mile of

> it when the collision occurred. He took his master's automobile, not in furtherance of any business of the master, but solely because it was a quicker means of conveyance than a street car, because without using it he would not have had time to attend to his private business. * * * This is not the case of a mere slight deviation from the line of duty but a departure for the purposes of the servant."

In the leading case of

Patterson v. Kates, 152 Fed. 481,

(cited in the *Gousee* case), the employee was to take the employer's car from Atlantic City to Philadelphia. His route took him through Northmont and then Gloucester, which towns were a few miles apart. At Gloucester he met a man named Farley, who asked him to take him to Northmont, which he did. On his return to Gloucester enroute to Philadelphia, the accident occurred. The Court held he was not in the scope of his employment.

In

Gordon v. Flaherty (Cal.), 72 Pac. (2d) 538,

the employee was to go to a bank, get change and turn it in at a branch office. At the bank he met a friend who asked him to take her home. *He went to the branch office but instead of stopping there, proceeded beyond. About three blocks beyond the collision occurred.* Held not in scope of employment.

In

Rutherford v. U. S., 73 Fed. Supp. 867,

the Government driver left a radio station where he participated in a recruiting drive. The collision oc-

curred on his way home. The Court held that driving home was not in scope of his employment.

In

Long v. U. S., 78 Fed. Supp. 35,

a Government employee drove a Government car beyond his instructed destination, during which time the collision occurred. Held jurisdictional requirements were not established.

CONCLUSION.

The burden of proof is on appellees to establish the jurisdictional requirements. It would contravene the intention of Congress for this Court to hold that this is established by a stipulation that the vehicle was a Government vehicle and that Hadley had been employed by the Government.

The fact that Hadley was on his way to his mother's home to eat dinner and might stop at a finance company to cash one of his checks does not, likewise, establish the jurisdictional requirements. It was a deviation for his own *purposes*. The Government could not have contemplated that he would do this or even have foreseen it. It will also be noted it was at the close of an Army day, which starts at 7:30 A.M. and ends at 4:00 P.M.; that the accident happened late Friday afternoon, about 4:45 P.M.; that the civilian employees of the Army do not work on Saturday. This may have to come under judicial notice, however it is a commonly known fact. Hadley was not on duty after working hours. The Government could not be held to

have consented to the use of the Government car to go to his mother's for dinner after working hours; on the contrary, there are regulations against it.

Hadley made an engagement for dinner with his mother. The time she expected him was approximately one hour after the accident. The Court can take judicial notice that the site of the accident was, roughly, one hour's normal driving time to San Francisco. It seems apparent that Hadley was going there on his own business. To hold otherwise, would extend the scope of employment far beyond the law of even California, and certainly far beyond the intent of Congress and the decisions of the Federal Court relative thereto.

Dated, San Francisco, California,
September 20, 1950.

Respectfully submitted,

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